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ALEXANDER L. STEVAS,
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

MILLIKEN & COMPANY,
Petitioner,

v.

BURLINGTON INDUSTRIES, INC.,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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QUESTIONS PRESENTED

1. In an antitrust case where patent royalties have been found to be fixed by a conspiracy, did the district court have the authority under § 4 of the Clayton Act to exclude from the treble damage judgment all sums attributable to one conspirator who is not a defendant in this case and who earlier settled with the plaintiff?

2. Should the defendants have an opportunity to prove that the cause of two-thirds of the treble damages claimed by the plaintiff was not the defendants' conspiracy, but instead was the plaintiff's own conduct?

3. Was the Fourth Circuit in error to hold that the plaintiff established a "prima facie" case on damages under § 4 of the Clayton Act solely by proving the amount of royalties actually paid, without also showing the amount of royalties that would have been paid absent the conspiracy?

PARTIES

There were six parties to this case in the Fourth Circuit Court of Appeals that are not listed in the caption of this petition:

Madison Throwing Company, Inc., now a division of Respondent Burlington Industries, Inc.;

The Duplan Corporation, which has settled this case with Petitioner and the other defendants.

Milliken Research Corporation, formerly known as Deering Milliken Research Corporation, a subsidiary of Milliken & Company;

ASA, S.A., formerly known as Ateliers Roannais de Constructions Textiles, S.A.;

ARCT, Inc.; and

Chavanoz, S.A., formerly known as Moulinage et Retorderie de Chavanoz, S.A.

A separate petition for certiorari is being filed on behalf of Milliken Research Corporation and Chavanoz, S.A.

Milliken & Company, formerly known as Deering Milliken, Inc., has the following parents, subsidiaries or affiliates:

Clemson Fabrics Corporation
Gilliland Industries
Judson Corporation
Lockhart Power Company
Milliken International
Milliken Research Corporation
Milline Advertising, Inc.

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**PETITION FOR WRIT OF CERTIORARI TO THE
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Milliken & Company ("Milliken") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinions below on damages are as follows:

Appendix A: Opinion of the United States Court of Appeals for the Fourth Circuit, 690 F.2d 380 (4th Cir. Sept. 23, 1983);

Appendix B: Opinion of the United States District Court for the District of South Carolina on damages, 1981-82, Trade Cas. (CCH) ¶ 64,214 (D.S.C. June 15, 1981);

Appendix C: Opinion of the United States District Court for the District of South Carolina on the re-

duction of damages, 1982-1 Trade Cas. (CCH) ¶ 64,547 (D.S.C. Feb. 12, 1982);

Appendix D: Pretrial Order of the United States District Court for the District of South Carolina (unreported) (Aug. 4, 1980);

Appendix E: Judgment of the District Court for the District of South Carolina on damages (unreported) (July 8, 1981);

Appendix F: Corrected Judgment of the District Court for the District of South Carolina on the reduction of damages (unreported) (March 8, 1982);

Appendix G: Judgment of the United States Court of Appeals for the Fourth Circuit (unreported) (Sept. 23, 1982);

Appendix H: Order of the United States Court of Appeals for the Fourth Circuit denying petition for rehearing and suggestion for rehearing *en banc* (unreported) (Nov. 26, 1982);

Appendix I: Excerpts from findings of fact by the United States District Court for the District of South Carolina on liability (unreported) (July 29, 1977);

Appendix J: Pretrial order of the United States District Court for the District of South Carolina bifurcating the trial (unreported) (April 2, 1976).

The opinions on liability are not contained in the appendix to this petition but are reported at *Duplan Corp. v. Deering Milliken, Inc.*, 444 F. Supp. 648 (D.S.C. 1977), *aff'd in part and rev'd in part*, 594 F.2d 979 (4th Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980).

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Fourth Circuit was entered on September 23, 1982. App. G. Milliken filed a timely petition for rehearing and suggestion for rehearing *en banc* on October 7, 1982, which was denied on November 26, 1982. App. H.

STATUTES INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in relevant part as follows:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

(a) *Summary*

This is an antitrust case arising out of the textile industry. The district court's jurisdiction was based upon 28 U.S.C. §§ 1331, 1337 and 1338. The case was bifurcated into a liability trial and a separate damages trial, and both were tried to the district court (Franklin T. Dupree, Jr., C. J.) sitting without a jury. The district court made extensive and detailed findings of fact, and this petition raises no dispute as to the accuracy of those findings.

The liability phase resulted in a judgment that Milliken Research Corporation ("MRC") and four other defendants violated the antitrust laws by conspiring with Leeson Corporation ("Leesona") to stabilize and maintain patent royalties. (Leesona is not and never has been a party in this case.) Milliken was held to be vicariously liable for the acts of its subsidiary MRC. That judgment is not in issue in this petition, which involves only the damages phase of this case.

The questions here are, first, whether, as the Fourth Circuit held, Milliken and the other defendants may be liable for treble damages that are attributable solely to the conduct of Leesona. (There is no dispute in this petition that Milliken and the other defendants are jointly and severally liable for treble damages attributable to

their own conduct, which may well total millions of dollars.) The second question is whether, again as the Fourth Circuit held, Milliken should be denied any opportunity in the damages phase to prove that the conspiracy was not the cause of two-thirds of the treble damages claimed by Respondent Burlington Industries, Inc. ("Burlington"). The final question is whether the Fourth Circuit was correct to hold that Burlington established a *prima facie* case on the amount of treble damages even though it prevented *no* evidence of the level of patent royalties it would have paid absent the conspiracy.

These issues, which this Court has never squarely examined, are all fundamental to the calculation of treble damages under § 4 of the Clayton Act. This major antitrust case, which arises on a full factual record, is an opportunity for this Court to consider and resolve these basic questions. Indeed, this case presents on a better record damage issues similar to those in *Weyerhaeuser Co. v. Lyman Lamb Co.*, *cert. granted*, 102 S.Ct. 2232 (May 17, 1982) (Nos. 81-1618 and 81-1619).

(b) *The Antitrust Violation*

The facts of this case are set out in detail in the district court's liability opinion. *Duplan Corp. v. Deering Milliken, Inc.*, 444 F. Supp. 648, 657-83 (D.S.C. 1977), *aff'd in relevant part*, 594 F.2d 979 (4th Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980). The following is an outline of the most important points:

False twist textile machines, invented in the 1950's, heat, stretch and twist synthetic yarn to give it a texture similar to wool or cotton. Leeson, a manufacturer of textile machinery, held patents on false twist machines. It manufactured these machines itself and also licensed other manufacturers to make them. The district court described Leeson as "perhaps the biggest textile machinery company on earth." App. 93. Until 1959, Leeson

was the only seller of false twist machines in the United States, and as late as 1969 it still controlled nearly two-thirds of the market. Joint Appendix in the Fourth Circuit ("J.A.") 294-95, 2575-76, 2593.

Leesona required the owners of false twist machines covered by its patents to accept a use license, which obligated the owner to pay Leesona a royalty of a few cents for each pound of yarn spun on the machine. The owners of the machines are called "throwsters," an old word that comes from the motion of the hand in spinning silk thread.

Chavanoz, S.A. ("Chavanoz") also held patents on false twist machines; it licensed ASA, S.A. ("ASA") to make machines under its patents, and it licensed MRC to enter into use licenses with throwsters in the United States who bought the Chavanoz/ASA machines. The MRC use licenses—like the Leesona use license—required a royalty for each pound of yarn spun. The royalties were divided equally between Chavanoz and MRC. *Duplan Corp.*, 444 F. Supp. at 663-64. MRC did not sell the Chavanoz/ASA machines; it only licensed the use of these machines under the Chavanoz patents. Whitin Machine Works sold the Chavanoz/ASA machines in the United States until 1966, when ARCT, Inc. ("ARCT") took over the sale of these machines.

Burlington, which is a throwster, bought both Leesona machines and Chavanoz/ASA machines and took use licenses from both Leesona and MRC. During the relevant times, the use royalties Burlington paid Leesona (\$4.99 million) were almost double the royalties it paid Milliken (\$2.76 million). App. 66-67. These use royalties are the basis of Burlington's claim for treble damages against Milliken and the other defendants in this case.

The antitrust violation found by the district court occurred in connection with the settlement in 1964 of patent

litigation between Leesona and Whitin Machine Works. The liability phase resulted in a finding that the *Whitin* settlement, and the negotiations leading to it, amounted to an illegal agreement among Leesona, MRC, Chavanoz, ASA and ARCT to stabilize and maintain the use royalties collected on both the Leesona machines and the Chavanoz/ASA machines. *Duplan Corp.*, 444 F. Supp. at 685-86. (Milliken and the other defendants vigorously disputed that any inference of price-fixing could be drawn from the facts, and indeed the district court conceded that this was a "very close case on the liability issues." App. 54.)

In addition, the district court held that MRC, Chavanoz, ASA and ARCT had "knowingly facilitated" the existing conspiracy among Leesona and other machinery manufacturers to fix the price of Leesona's machines by means of illegal kickbacks. *Duplan Corp.*, 444 F. Supp. at 686, (citing *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977)). Milliken was held vicariously liable for the conduct of its subsidiary MRC. *Duplan Corp.*, 444 F. Supp. at 688-89.

(c) *The Leesona/Burlington Conspiracy, and Their Subsequent Antitrust Settlement*

In April 1963, the year before the *Whitin* settlement, Burlington "orchestrated" a settlement of patent litigation between (among others) Leesona and Burlington's then secret subsidiary, Madison Throwing Company.¹ App. 107.

This 1963 settlement had three important features:

¹ See *Benoit v. Burlington Ind., Inc.* 1976-1 Trade Cas. (CCH) ¶ 60,686, at 67,983 (S.D.N.Y. Dec. 23, 1975) ("Burlington's controlling interest in Madison was a closely guarded secret in the textile industry"). Madison is now a division of Burlington.

(i) Burlington accepted a standard Leeson a use license, which obligated Burlington to pay specified use royalties to Leeson a;

(ii) A defendant in the case, Mechanical Specialty Co., accepted a standard Leeson a manufacturer's license, which provided for a kickback of one-third of the royalties paid to Leeson a by throwsters using Mechanical Specialty machines; and

(iii) Leeson a paid the kickbacks under this license to Burlington, not Mechanical Specialty Co.

The kickbacks paid by Leeson a under its standard manufacturer's license were held to be price fixing *per se* illegal under § 1 of the Sherman Act. *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127, 1136 (5th Cir. 1976) ("[B]y means of the royalty sharing arrangement between Leeson a and the machinery manufacturers, the price of the machinery which the throwsters would have to pay was fixed"), *cert. denied*, 433 U.S. 910 (1977).

Between 1966 and 1969, Leeson a paid Burlington \$471,364 in kickbacks. J.A. 1658-59. Indeed, Milliken offered to prove, *inter alia*, that more than 95% of all illegal kickbacks paid by Leeson a in the course of its machinery price-fixing scheme went to Burlington. J.A. 859. This offer of proof was excluded by the district court.

In the subsequent *Yarn Processing* litigation in Florida, Burlington asserted various antitrust claims against Leeson a, including the claim that in 1964 Leeson a conspired with MRC and Chavanoz to stabilize and maintain their patent use royalties. *See Yarn Processing*, 341 F. Supp. 376 (J.P.M.D.L. 1972) (consolidating antitrust and patent suits against Leeson a in the Southern District of Florida). (Neither Milliken nor any other defendant here was a party to the *Yarn Processing* litigation; Leeson a, as stated, has never been a party in this case.)

In 1974, Leeson and Burlington settled *Yarn Processing* by Leeson's agreement to pay Burlington \$789,638 over five years. App. 59.

The striking feature of Burlington's 1974 settlement with Leeson is that the district court in Florida had already ruled that Leeson had violated the antitrust laws, a ruling later affirmed by the Fifth Circuit.² At the time of the settlement, Leeson was perfectly solvent. J.A. 2566-67. Although Burlington has claimed treble damages of at least \$14.9 million arising from its royalty payments to Leeson, App. 48-50, it settled with Leeson, even after a favorable ruling, for only five percent of those treble damages.

(d) *Proceedings Below*

In the damages phase, Burlington sought three times its total use royalty payments to both Leeson and MRC, less only the modest payment from Leeson in the 1974 settlement, deducted *after* trebling. Burlington made no attempt whatsoever to show the royalties (or other costs) it would have paid in the absence of the conspiracy.

Milliken and the other defendants sought discovery on the factual issue of the royalties that would have been paid absent the conspiracy, but the district denied this discovery, ruling "that proof of the amount of such royalties [i.e., royalties actually paid] by plaintiffs will suffice to establish a prima facie case of actual damages . . ." App. 77. Defendants, without the aid of discovery, then prepared a detailed proffer of evidence, including the opinion of an economist, to show the level of royalties that Burlington would have paid absent the restraint. The district court rejected this proffer and awarded Burlington treble damages of \$20.9 million. The

² The settlement was in November 1974, App. 59; the district court had ruled in Burlington's favor six months earlier, in April 1974. *Yarn Processing*, 541 F.2d at 1132.

judgment included \$13.4 million in treble damages for the royalties Burlington paid Leeson. App. 66-67.

In addition, the district court denied Milliken and the other defendants any opportunity to prove that the conspiracy was not the cause of Burlington's royalty payments to Leeson. App. 12.

After appeals were taken, defendants moved to correct the judgment under Fed.R.Civ.P. 60(b) by excluding the Leeson-related treble damages. The district court granted the motion and requested a limited remand from the Fourth Circuit to correct its judgment. App. 70. The Fourth Circuit granted the remand, and the district court, after a hearing, corrected its judgment by excluding the Leeson-related treble damages. The corrected judgment then amounted to \$7.5 million. App. 88-89.

On appeal, the Fourth Circuit reversed the district court's refusal to allow Milliken to attempt to prove the level of royalties in the absence of the restraint, but it agreed with the district court that bare proof of the royalties actually paid established a *prima facie* case on damages. App. 11-15.

The Fourth Circuit also rejected Milliken's arguments that it should be permitted to show that Burlington's own conduct in 1963 was the cause of its royalty payments to Leeson. According to the Fourth Circuit, this was merely an attempted *in pari delicto* defense, which was untimely in the damages phase. App. 12-13. On this point Circuit Judge Kenneth Hall dissented, stating "I am astonished that my brethren would countenance Burlington's opportunistic approach to this case much less sanction a reward for such reprehensible conduct." App. 32. Judge Hall would have excluded the Leeson-related damages on the ground that Burlington itself had conspired with Leeson.

Finally, the Fourth Circuit reversed the exclusion of Leeson-related treble damages on the ground that cer-

tain recent decisions by this Court rest on "principles" that are "inconsistent" with the exclusion of these damages. App. 25.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this case raises three absolutely fundamental questions regarding the calculation of treble damages under § 4 of the Clayton Act, which have not been previously answered or squarely considered by this Court. Treble damages are punitive, not merely compensatory, and thus damage rules under § 4 are especially critical. *Cf. Blue Shield of Virginia v. McCready*, 102 S.Ct. 2540, 2548 (1982) ("[T]he potency of the [treble damage] remedy implies the need for some care in its application"). In addition, the Fourth Circuit's "prima facie" case rule is consistent with a Fifth Circuit decision, but in conflict with the reasoning of cases in the Seventh, Ninth and Eleventh Circuits. Finally, although this case has a full factual record, the questions presented are not fact-bound, and a decision by this Court would find application in virtually all civil antitrust cases. These questions go to the heart of the private treble damage remedy and warrant definitive resolution by this Court.

(a) *The District Court Had the Authority to Exclude the Leeson-related Treble Damages From the Judgment Against Milliken*

The district court, using the terminology "claim reduction," excluded the treble damages attributable to Leeson from the damage judgment against Milliken and the other defendants. The basis for this apportionment of damages was the amount of royalties Burlington paid to Leeson on the one hand and to MRC/Chavanoz on the other. (None of the defendants received even a penny of the royalties Burlington paid to Leeson.³) Under the

³ Remarkably, Burlington even seeks damages for royalties paid to Leeson by Fedelon Throwing Company, which is now one of

district court's judgment, MRC, Chavanoz, ASA and ARCT are jointly and severally liable for damages attributable to Leeson. (Milliken was held vicariously liable for the acts of its subsidiary MRC.)

The district court's ruling modified the traditional rule of joint and several liability in antitrust cases. Under joint and several liability in its traditional form, the apportionment of damages among tortfeasors who have acted in concert is left entirely to the plaintiff, and the court may not supervise the method of apportionment selected by the plaintiff, even if it is whimsical, malicious or indeed anticompetitive. The plaintiff's choices are wholly unsupervised. *Cf. American Society of Mechanical Engineers, Inc., v. Hydrolevel Corp.*, 102 S.Ct. 1935, 1949 n.1 (1982) (Powell, J., dissenting) (questioning the wisdom of allowing "the beneficiaries of the fraudulent conduct in this case" to settle for a small fraction of the total damages). Yet there has never been a reasoned analysis of the purpose or effects of joint and several liability in antitrust cases.⁴

Burlington's divisions. Neither Milliken nor any other defendant here ever dealt with Fedelon directly or indirectly or had any notice of its claim. In their separate petition, MRC and Chavanoz ask this Court to hold that any recovery on account of Fedelon's claim would violate Due Process, and Milliken joins in that request.

⁴ No decision by this Court has ever squarely adopted the traditional form of joint and several liability in an antitrust case. *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 342-48 (1971) (effect of release of fewer than all antitrust conspirators); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 144 (1968) (White, J., concurring) ("[D]amages normally may be had from either or both defendants without regard to their relative responsibility"). Moreover, none of the circuit court cases contains a careful or detailed analysis of the proper scope of joint and several liability. *See, e.g., Hydrolevel Corp. v. American Society of Mechanical Engineers, Inc.*, 635 F.2d 118, 130 (2d Cir. 1980), *aff'd on other grounds*, 102 S.Ct. 1935 (1982); *Baughman v. Cooper-Jarrett, Inc.*, 530 F.2d 529, 534 (3d Cir.); *cert. denied*, 429 U.S. 825 (1976); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 397 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

Modifying the judge-made rule of joint and several liability stands on a different footing than the adoption of a new cause of action such as contribution. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (refusing to create a new cause of action for contribution in antitrust cases). Even the Fourth Circuit recognized this when it admitted that "the narrow holding of *Texas Industries* does not expressly foreclose a defense of claim reduction." App. 25. In *Texas Industries*, this Court implied that the courts were authorized to adopt joint and several liability in order to "identify the scope of the remedy Congress itself has provided" in § 4 of the Clayton Act. *Texas Industries*, 451 U.S. at 646. Thus, modifying joint and several liability to permit apportionment would simply interpret the "scope" of the § 4 remedy, and would not "alter or supplement" that remedy. As this Court stated in *Texas Industries*, "joint and several liability simply ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants." *Texas Industries*, 451 U.S. at 646.

Importantly, this Court's rationale for joint and several liability in *Texas Industries* is much narrower than the rule it justifies. Certainly it is not necessary to abandon *all* judicial supervision of the plaintiff's apportionment of damages simply to ensure that the plaintiff will be able to collect his full treble damages. The plaintiff's right to collect can be fully protected by not permitting apportionment of treble damages in those cases where one or more of the parties to the illegal restraint are insolvent or unavailable, or in cases where there is no rational basis for an apportionment.

The modification of joint and several liability is not a question for Congress. It is the province of the federal courts, which adopted the doctrine in antitrust cases in the first instance. Neither the language of § 4 of the Clayton Act, nor its legislative history, calls for joint

and several liability. Indeed, this Court in *Texas Industries* illustrated the proper use of judicial authority by reference to the adoption of joint and several liability. 451 U.S. at 646 (citing *City of Atlanta v. Chattanooga Foundry and Pipe Works*, 127 F. 23, 26 (6th Cir. 1903), *aff'd on other grounds*, 203 U.S. 390 (1906)). If the adoption of this doctrine was a proper exercise of judicial authority, then its modification is within judicial authority as well.⁵ Moreover, in the past this Court has not hesitated to alter erroneous or outmoded rules. *E.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (reversing prior law). See *Girouard v. United States*, 328 U.S. 61, 70 (1946) ("The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases").

The Fourth Circuit argued that this Court's decisions in *Texas Industries* and *Hydrolevel Corp.* rest on "principles" that are "inconsistent" with the district court's modification of joint and several liability, in particular that "[t]he very idea of treble damages reveals an intent to punish past, and to deter future unlawful conduct, not to ameliorate the liability of wrongdoers." App. 25 (quoting *Texas Industries*, 451 U.S. at 639). But the issue here is precisely whether the traditional form of joint and several liability is consistent with the rationale given for it in *Texas Industries*.

⁵ As an example, the lower federal courts have held that the amount of a prior settlement should be deducted from the plaintiff's judgment only *after* trebling, which in effect reduces the value of any settlement by two-thirds. *E.g.*, *Flinkote Co. v. Lysfjord*, 246 F.2d 368, 397 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). The Fourth Circuit cited this rule with approval. App. 26. Yet the federal courts have adopted this modification of joint and several liability without any suggestion that this question should be left to Congress. See Bernard, *On Judgments and Settlements in Antitrust Litigation: When Should Damages Be Trebled?*, 56 St. John's L.Rev. 1 (1981) (arguing that *Flintkote* should be reversed).

Joint and several liability was established in *Hill v. Goodchild*, 98 Eng. Rep. 465 (K.B. 1771). Even then, however, Lord Mansfield expressed grave doubt that the rule was correct:

Lord Mansfield observed that in fact, all the defendants may be guilty; and yet the degrees of their guilt may be different: but the present question is whether upon a charge of a joint trespass, the jury can assess damages according to different degrees of guilt; *though the real justice is, that the damages should be respectively assessed in proportion to the real injury done by each defendant. . . .* It is a strange thing, that a matter which happens every day, should be attended with such difficulties (emphasis added).

As Lord Mansfield suggested, joint and several liability in its traditional form is of doubtful wisdom. Given the importance of this question in antitrust law, and in light of the narrow rationale given in *Texas Industries*, certiorari should be granted to consider the proper scope of joint and several liability under § 4 of the Clayton Act.

(b) *Milliken Should Be Afforded an Opportunity to Prove That the Cause of Burlington's Payments to Leeson Was Burlington's Own Conduct*

The second question raised by this petition also involves the exclusion of Leeson-related treble damages from Burlington's recovery against Milliken and the other defendants. Milliken has never been afforded a day in court to prove that the cause of Burlington's payments to Leeson was Burlington's own conduct in 1963 and not the 1964 antitrust violation found in the liability phase here. Cf. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, No. 81-834 (U.S. Feb. 22, 1983) (holding allegations of consequential damage from antitrust violation insufficient as matter of law).

The Fourth Circuit claimed that disputing the causation of the Leeson-related damages was "untimely" be-

cause it would "reopen the liability phase." App. 13. In the liability phase, however, the district court found "fact of injury" to Burlington based on evidence of Burlington's royalty payments *only* to MRC/Chavanoz. *Duplan Corp.*, 444 F. Supp. at 687 & n.20. There was *no* finding one way or the other regarding the Leeson royalties as showing fact of injury. Now in the damages phase Burlington for the first time has claimed Leeson-related treble damages, but the Fourth Circuit held that to dispute this item of damages would be "untimely."⁶

The majority opinion below began by analyzing Burlington's conduct in terms of *in pari delicto*. *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968) (Black, J.) ("[T]he doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action"). Although Milliken in its briefs (filed jointly with the other defendants) stressed that the issue was the *causation* of Burlington's payments to Leeson, the Fourth Circuit blindly insisted that this did not alter the "nature" of the *in pari delicto* defense, which "goes to the issue of liability . . . rather than the extent of damages." App. 12-13. Having decided that the issue was *in pari delicto*, the majority ruled that Burlington's conduct was insufficient to support that defense.

Contrary to the decision below, the correct question of law is: Did the antitrust violation in 1964 cause Burlington to pay royalties to Leeson? But the Fourth Circuit majority asked and answered a different question altogether: Do the defendants have a complete affirmative

⁶ Surprisingly, in ruling that Burlington was entitled to claim Fedelon-related damages, the Fourth Circuit stated:

The liability phase of the trial did not require plaintiffs to separate out their various items of damage. Instead, it focused primarily on the relationship among the various defendants. App. 20.

This is plainly inconsistent with the majority's position that disputing Burlington's claim to Leeson-related damages would have been proper in the liability phase.

defense of *in pari delicto* to all antitrust liability? This case justifies certiorari not because the majority's answer was erroneous, but rather because it was asking the wrong question. *Perma Life*, 392 U.S. at 143, 146 (White, J., concurring) (*in pari delicto* "is not a useful concept;" the conduct of the parties should be analyzed in terms of causation); *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122, 1131 (S.D. Tex. 1976) (Bue, J.) (evidence of plaintiff's conduct is appropriate "when it provides rebuttal to that plaintiff's allegations of causation of injury by defendant and resulting damages therefrom").

Milliken and the other defendants should at least be allowed an opportunity to rebut Burlington's claim that the 1964 antitrust violation found in the liability phase caused Burlington to pay Leeson royalties. In 1963, the year before that antitrust violation, Burlington agreed by contract to pay royalties to Leeson at a specified rate. Moreover, Burlington agreed to this precisely because the one-third kickback from Leeson gave it a cost advantage over other throwsters, who paid Leeson's full royalty.

The majority below reasoned that deducting the amount of the kickbacks from the royalties paid, as the district court did, adequately accounted for Burlington's role in the 1963 settlement. App. 14. This was error. The illegal kickbacks were merely the *quid pro quo* to Burlington in exchange for supporting Leeson's royalty program as applied to other throwsters. An adequate accounting of Burlington's role requires the exclusion of Leeson-related damages from Burlington's recovery against defendants here.

The kickbacks from Leeson were part of a *per se* violation of § 1 of the Sherman Act. *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127, 1136 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977). Burlington's goal was to stabilize and maintain the Leeson

royalties paid by the *other* throwsters. All this was accomplished in the 1963 settlement with Leeson that was "orchestrated" by Burlington. App. 107.

Since Burlington contrived to keep the Leeson royalty program in place, and expressly agreed to pay Leeson royalties, the cause of Burlington's payment of royalties to Leeson was Burlington's own conduct. Circuit Judge Hall in dissent below put the matter well:

I would not permit Burlington to recover any of the royalties paid to Leeson. Burlington engineered the [1963] settlement with Leeson, and designed the royalty-kickback machinery for their mutual benefit. The [1964] settlement between the defendants and Leeson simply perpetuated that compact. Burlington now should not be heard to complain that it was actually harmed by its own scheme—a scheme different from the one the majority finds to have been disposed of in the liability portion of this litigation. App. 36.

The majority's holding below should be reviewed on certiorari to establish that a defendant must have at least an opportunity to rebut a plaintiff's claim that a particular item of treble damages was caused by that defendant.

(c) In a Price-fixing Case, the Plaintiff Cannot Make Any Case for Damages, Prima Facie or Otherwise, Without Proof of an Overcharge

The Fourth Circuit appeared to recognize that in price-fixing cases the measure of damages is the amount of the illegal overcharge—the difference between the price actually paid and the price that would have been paid but for the proven restraint. "A plaintiff does not satisfy that burden [of proving damages] by offering no proof at all, except what he paid the violator." App. 9 (quoting *Alden-Rochelle, Inc. v. American Society of Composers, Authors and Publishers*, 80 F. Supp. 888, 898 (S.D.

N.Y. 1948)). This is a simple and long-established rule. *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906) (Holmes, J.).

The Fourth Circuit, however, made an important and erroneous change in this rule. It held that Burlington established a "prima facie" case on the amount of the overcharge by presenting evidence of *only* the royalties actually paid. App. 11, 15. This holding both undercuts the rule that a plaintiff must prove the amount of the overcharge and places the Fourth Circuit in conflict with the reasoning of cases in the Seventh, Ninth and Eleventh Circuits. *MCI Communications Corp. v. A.T.&T. Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,137 (7th Cir. Jan. 12, 1983); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 52 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972); *Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir.), *cert. denied*, 103 S.Ct. 127 (1982).

The Fourth Circuit's novel prima facie case rule is contrary to the fundamental principle that a plaintiff must show the extent of injury suffered. *Westinghouse Electric & Manufacturing Co. v. Wagner Electric & Manufacturing Co.*, 225 U.S. 604, 616 (1912) ("[T]he general proposition [is] that the plaintiff must prove its case and carry the burden imposed by law upon every person seeking to recover money or property from another"). The judge or jury, under the Fourth Circuit's rule, may find the amount of the overcharge based solely on evidence that even the Fourth Circuit admits is not probative. In the Fourth Circuit's own words, it requires "an untenable leap of logic to suggest" that Burlington's damages can "fairly be equated with the royalties actually paid." App. 10-11. The Fourth Circuit's rule nonetheless permits a plaintiff to present evidence of the total royalties it paid and then rest its damage case without presenting any probative evidence showing the amount of the overcharge. This is no mere procedural change, but

rather a new substantive rule governing antitrust damages.⁷

The Fourth Circuit's misapprehension of the proper rule for proving the amount of the overcharge in a price-fixing case is not an isolated instance in the lower courts. The Fifth Circuit, in a phantom freight case, implicitly approved an instruction on damages that did not inform the jury that the total freight charges paid must be offset by the freight charges that would have been paid in a competitive market. *In re Plywood Antitrust Litigation*, 655 F.2d 627, 635 (5th Cir. 1981), *cert. granted sub nom.*, *Weyerhaeuser Co. v. Lyman Lamb Co.*, 102 S.Ct. 2232 (May 17, 1982) (Nos. 81-1618 and 81-1619). The instruction required the jury to answer yes or no to an interrogatory that asked whether the extent of the plaintiffs' injury equaled the total freight charges paid. The failure of the instruction to inform the jury of the proper measure of the amount of the overcharge caused the United States, as *amicus curiae*, to urge this Court to overturn the damage award. *Id.*, brief for the United States as *amicus curiae* at 22-25 (August, 1982).

The Fourth Circuit's *prima facie* case rule crystallizes the legal issue that is before this Court on certiorari in *Weyerhaeuser*—whether an antitrust plaintiff should be relieved of its duty to show the amount of the overcharge. Indeed, this case is more appropriate for review than *Weyerhaeuser*. The damage issues here were tried to the district court, which issued a detailed opinion, in con-

⁷ Cf. F. James, *Civil Procedure* § 7.9, at 261 (1965):

[C]ourts and legislatures have created presumptions in cases where either (1) B would be a permissible inference from A, but not the *only* permissible one, or (2) B would not even be a permissible inference from A. *In such situations a presumption has an artificial procedural force and effect (at the point where proponent rests his case) over and above the logical probative effect of the evidence* (notes omitted, emphasis in original and added).

trast to the jury verdict in *Weyerhaeuser*. Also, the record contains defendants' extensive proffer of proof on damages (which was excluded by the district court).

Moreover, the Fourth and Fifth Circuits are in conflict with the reasoning of cases in the Seventh, Ninth and Eleventh Circuits. In *MCI Communications Corp. v. A.T.&T. Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,137 (7th Cir. Jan. 12, 1983), the Seventh Circuit remanded for a new trial on damages because, *inter alia*, the plaintiff's damage evidence rested on the assumption that all the challenged activities of the defendant were unlawful, although the jury found some of these activities to be lawful. "It is a requirement that an antitrust plaintiff must prove that his damages were caused by the *unlawful* acts of the defendant." *MCI*, ¶ 65,137, at 71,414 (emphasis in original). The Seventh Circuit thus rejected the proposition that the plaintiff could make out a *prima facie* case merely by showing its total losses, some portion of which could be attributed to the defendant's unlawful acts.

The Ninth Circuit, in *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 52 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), a tie-in case, held that the total price paid for the tied products could not, as a matter of law, establish the fact of damage. The price that would have been charged for those products separately, absent the tie-in, had to be determined. "To ascertain whether an unlawful arrangement for the sale of products has caused injury to the purchaser, the cost or value of the products involved, free from the unlawful arrangement, *must first be ascertained*." *Siegel*, 448 F.2d at 52 (emphasis added). Because evidence of the total price paid for the tied products cannot establish the fact of damage, this evidence obviously cannot establish the amount of damages. *Accord, Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285-86 (11th Cir.) (plaintiff's failure to offer evidence on the "essential point" of the value of his franchise ab-

sent an alleged tie-in is fatal to his case), *cert. denied*, 103 S.Ct. 127 (1982). These holdings by the Ninth and Eleventh Circuits conflict with the Fourth Circuit's *prima facie* case rule.

Nothing in the cases cited by the Fourth Circuit supports its *prima facie* case rule. This Court's opinions in *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946), and *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927), are often cited for the so-called "uncertainty rule;" that is, once a plaintiff establishes the fact of injury under § 4 of the Clayton Act, its burden of showing the dollar amount of that injury is to some extent lightened. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 568 (1981). The plaintiffs in *Bigelow* and *Eastman Kodak* sought to measure their antitrust damages by the difference between the profits they actually earned and the profits they would have earned absent the defendants' wrongdoing. In both cases, the plaintiffs presented evidence of the amount of this difference in profits, and this Court held the plaintiffs' evidence to be sufficient proof of the plaintiffs' damages. *Bigelow*, 327 U.S. at 264-66; *Eastman Kodak*, 273 U.S. at 378-79. Uncertainties in the calculation of the damages, due to economic cycles and myriad other factors, could not defeat the plaintiffs' proof, but this Court never suggested that the burden of proof fell anywhere other than on plaintiffs.

The Fourth Circuit's novel *prima facie* case rule changes the meaning of "overcharge" in the calculation of antitrust treble damages and effectively removes the requirement that a damage award rest on proof of what the plaintiff's costs or profits would have been absent the violation. This is in conflict with decisions in other circuits, as well as long-standing principles of antitrust law, and therefore warrants review by this Court.

CONCLUSION

Milliken requests this Court to grant this petition for writ of certiorari and to reverse the decision below with respect to the Leeson-related treble damages; the denial of any opportunity for Milliken to introduce proof on the cause of Burlington's payments to Leeson; and the Fourth Circuit's *prima facie* case rule.

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